INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-128085	5/5/2014

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
SolarCity Corporation

b. Tel. No. N/A

c. Cell No. N/A

f. Fax No. N/A

g. e-Mail
N/A

d. Address *(Street, city, state, and ZIP code)*
Visalia Mall
2031 South Mooney Blvd.
Visalia, CA 93277

e. Employer Representative
Morgan, Lewis & Bockius LLP
2 Palo Alto Square
3000 El Camino Real, Suite 700
Palo Alto, CA 94306-2122

h. Number of workers employed
2,000

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Retail Kiosk

j. Identify principal product or service
Solar Products and Clean Energy Services

k The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 29 U.S.C. 157 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

SolarCity Corporation is maintaining a provision in their arbitration policy that requires employees to forego any rights they have to the resolution of employment-related disputes by collective action, class action, or representative action.

RECEIVED
NLRB REGION 32
2014 MAY -5 AM 10:23
OAKLAND, CA

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Anita Beth Irving

4a. Address *(Street and number, city, state, and ZIP code)*
26814 South Mooney Blvd., D126
Visalia, CA 93277

4b. Tel. No. (559) 723-0639

4c. Cell No. N/A

4d. Fax No. N/A

4e. e-Mail
shewolf768@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* N/A

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Kyle Nordrehaug, Esq.
(Signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 2255 Calle Clara, La Jolla, CA 92037

May 5, 2014
(date)

Tel. No. (858) 551-1223

Office, if any, Cell No. (858) 952-0351

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e-Mail
Kyle@bamlawca.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRST AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-128085	06/04/2014

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
SolarCity Corporation

b. Tel. No. N/A

c. Cell No. N/A

f. Fax No. N/A

g. e-Mail
N/A

d. Address *(Street, city, state, and ZIP code)*
Visalia Mall
2031 South Mooney Blvd.
Visalia, VA 93277

e. Employer Representative
Morgan, Lewis & Bockius LLP
2 Palo Alto Square
3000 El Camino Real, Suite 700
Palo Alto, CA 94306-2122

h. Number of workers employed
2,000

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Retail Kiosk

j. Identify principal product or service
Solar Products and Clean Energy Services

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

SolarCity Corporation is maintaining a provision in their arbitration policy that requires employees to forego any rights they have to the resolution of employment-related disputes by collective action, class action, or representative action.

Additionally, SolarCity Corporation is maintaining a provision in their arbitration policy that interferes with their employees' access to the National Labor Relations Board and its processes. Specifically, SolarCity Corporation maintains a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges and the policy does not clarify that the policy does not extend to the filing of unfair labor practice charges. U-Haul Co. of California, 347 NLRB 375, 377-78 (2006).

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Anita Beth Irving

4a. Address *(Street and number, city, state, and ZIP code)*
26814 South ~~Mooney~~ Mooney Blvd., D126
Visalia, CA 93277

4b. Tel. No. (559) 723-0639

4c. Cell No. N/A

4d. Fax No. N/A

4e. e-Mail
shewolf768@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* N/A

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Kyle Nordrehaug, Esq.
(Signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 2255 Calle Clara, La Jolla, CA 92037

June 4, 2014
(date)

Tel. No. (858) 551-1223

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Kyle@bamlawca.com

2014 JUN 5 P 1:52 NLRB REGION 31

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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June 16, 2014

VIA EMAIL(Amy.Berbower@nlrb.gov) AND ELECTRONIC FILING

Amy Berbower
Field Attorney
National Labor Relations Board, Region 32
1301 Clay Street, Ste 300N
Oakland, CA 94612

Re: SolarCity Corporation
Case No. 32-CA-128085

Dear Ms. Berbower:

Pursuant to your request, SolarCity Corporation ("SolarCity" or the "Company") provides this statement of position in response to the above-referenced charge (the "Charge") filed by Anita Beth Irving (the "Charging Party") on May 5, 2014. The Charging Party claims that the maintenance of the Company's Arbitration Agreement (the "Agreement") - which the Charging Party signed voluntarily - violated Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA"). The Charge should be dismissed for the following reasons.[1]

1. The Board's decision in *D.R. Horton* was both improperly issued and incorrect. The Charge has no merit because the National Labor Relations Board's (the "Board") decision in *D.R. Horton* was improperly issued since the Board did not have a proper quorum at the time of the decision. 357 NLRB No. 184 (Jan. 3, 2012), *enf. denied D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied* (5th Cir. Apr. 17, 2014) In addition, for a host of reasons recognized by numerous courts (including every federal circuit court that has addressed the theory) and discussed more fully below, the Board's *D.R. Horton* decision was incorrect as a matter of law.

2. The Arbitration Agreement at issue in this proceeding differs materially from the arbitration agreement found unlawful in *D.R. Horton*.
Even if the Region applies *D.R. Horton* to the facts of the instant case, the Charge should be dismissed because the Agreement is distinguishable from the arbitration agreement in *D.R. Horton*. Unlike the agreement at issue in *D.R. Horton*, the Agreement explicitly allows employees to file charges with the Board as well as with other administrative agencies and does not prohibit class/collective actions challenging the enforceability, revocability and validity of the Agreement.

[1] The Company stipulates that in the last twelve months, in the course and conduct of its business operations, the Company has provided services in excess of $50,000 to customers located directly outside the state of California.

These are important distinctions that remove the Agreement from the "small percentage" of arbitration agreements encompassed by *D.R. Horton.* 357 NLRB No. 184, at 12.

3. The Charging Party has not engaged in any protected concerted activity under the Act. The Charge should also be dismissed because the Charging Party has not engaged in any protected concerted activities under the Act. In fact, the only action the Charging Party has taken is to file an action, *after* her employment with SolarCity was terminated, seeking additional compensation for overtime to which she was allegedly entitled. The claims underlying the Charging Party's lawsuit do not amount to protected concerted activity within the meaning of the Act.

4. The Charge is time-barred by Section 10(b) of the Act.
The Charge should be dismissed because it was filed more than six months after the alleged violation occurred, namely the entering into of the Agreement by the Charging Party. A *D.R. Horton* violation depends on the circumstances in which the agreement was entered into - whether it was voluntary or a condition of employment. Therefore, in order to find merit to this Charge, the Region must determine whether the Agreement was voluntarily entered into at the time the Charging Party became bound by it. Because the Charging Party entered into the Agreement on November 14, 2012, but did not file her charge until 18 months later, long after the Section 10(b) period expired, the allegation is time-barred.

5. The Agreement expressly permits employees to file claims and charges with the Board.
Finally, the Agreement does not prohibit employees from filing or cooperating in the processing of unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act. On the contrary, the Agreement specifically permits employees "without limitation" to file charges with the Board. Any ambiguity that could arguably have been created by the Agreement as to whether or not employees may file charges or claims with the Board was subsequently cured by the Agreement's explicit provisions authorizing employees to file such charges and claims.

FACTUAL BACKGROUND

A. SolarCity and the Charging Party

SolarCity is America's largest solar power provider, providing solar energy services nationwide to homeowners, businesses, schools, non-profits and government organizations. The Charging Party was employed by the Company as a part-time Retail Energy Advisor at its Fresno facility. The Charging Party was employed with the Company from November 26, 2012 until September 17, 2013. On December 24, 2013, the Charging Party filed a lawsuit in California state court, claiming, *inter alia*, that the Company had violated the California Labor Code by failing to pay her for all overtime worked.

B. The Arbitration Agreement

The Company implemented and maintained the Agreement at its California facilities, including its Fresno facility. *See* Ex. 1 for a list of the Company's California facilities where the Agreement was

implemented and maintained. The Agreement was applicable to all employees at the California facilities.

On November 14, 2012, two weeks before she started working at the Company, and at the time she accepted her offer of employment, the Charging Party signed the Agreement, indicating her acceptance of the terms of the Company's arbitration policy. *See* Ex. 2. In relevant part, the Agreement provided as follows:

> This Agreement applies to any dispute arising out of or related to Employee's employment, including termination of employment, with the Company or one of its affiliates, subsidiaries or parent companies.
>
> . . .
>
> Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court of jury trial.

See Ex. 2.

The Agreement expressly permitted employees to file charges with several enumerated government agencies, including the Board. Specifically, the Agreement stated that:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. *Such administrative claims include without limitation claims or charges brought before* the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), *the National Labor Relations Board (www.nlrb.gov)*, the Office of Federal Contract Compliance Programs (www.dol.esa.ofccp) and other similar federal and state agencies.

See Ex. 2 (emphasis added).

Finally, the Agreement provided that arbitration of any covered dispute would be on an individual basis, except that actions to challenge the "enforceability, revocability or validity of the Agreement or any portion of the Agreement" would excluded from the Agreement's coverage. *See* Ex. 2.

ARGUMENT

A. *D.R. Horton* Was Both Improperly Issued and Incorrect.

The Supreme Court and the Board have long held that voluntary arbitration is a preferred and mutually beneficial means of resolving disputes. *See Olin Corp.*, 268 NLRB 573, 574 (1984) ("It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *14 Penn Plaza LLC v. Pyett*, 556

U.S. 247 (2009) (holding that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate discrimination claims is enforceable). Despite this binding authority, the Board in *D.R. Horton* held that the employer violated Section 7 of the Act by requiring employees, as a condition of employment, to enter into an arbitration agreement that did not permit collective or class action lawsuits. For a number of reasons, the Board's *D.R. Horton* decision was both improperly issued and incorrect.

1. *D.R. Horton* Was Improperly Issued

The Board's decision in *D.R. Horton* was issued by only two Board members (Member Becker and Member Pearce) in a 2-0 decision, with Member Hayes recused. However, 29 U.S.C. § 153(b) requires that a quorum of *three members* participate in each decision. The Board could only have properly issued the *Horton* decision with two members if it had first delegated its authority to a three-member panel. 29 U.S.C. § 153(b); *see also United States Department of Justice, Office of Legal Counsel Memorandum*, dated Mar. 4, 2003, at 7a ("[T]he statute provides that once a delegation is made to a group of three or more members, the quorum becomes the group of two."). It did not do so, and therefore the *Horton* decision is invalid. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

While Member Hayes's recusal would not have affected the quorum had there been a proper delegation, in the absence of a proper delegation, Member Hayes could not properly be considered to have "participated" in the *Horton* decision. *See Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1186-87 (2000) (discussing cases holding that members of multimember agencies who are disqualified from participating in a decision do not count toward the quorum).

Moreover, even if Member Hayes had "participated" in the *D.R. Horton* decision, which he did not, the decision is still invalid because Member Becker's appointment was unconstitutional. In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted, NLRB v. Noel Canning*, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (2013), the United States Court of Appeals for the District of Columbia ruled that *all* inter-session recess appointments by the President are unconstitutional. The majority additionally ruled that inter-session recess appointments can only take place for vacancies that "happen" (i.e., originate) during that same recess. *Noel Canning*, 705 F.3d at 507-13. Member Becker's recess appointment on March 27, 2010 was unconstitutional both because (1) it occurred inter-session (during the second session of the 111th Congress, *see* Congressional Directory for the 112th Congress, *available at* http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf (p. 536-38) (last visited June 9, 2014), and because (2) it purported to fill a vacancy on the Board that originated during a previous inter-session recess (on December 17, 2004, between the 108th and 109th Congresses, *see* http://www.nlrb.gov/members-nlrb-1935 (last visited June 9, 2014)). *Noel Canning*, 705 F.3d at 514, citing 29 U.S.C. § 153(b); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013) (agreeing with *Noel Canning* and finding the NLRB recess appointments unconstitutional); *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609 (4th Cir. 2013) (same).

Thus, even if Member Hayes sufficiently "participated" in the *D.R. Horton* decision (which he did not), it is still invalid for lack of quorum because, under *Noel Canning*, there were, at most, only two properly sitting Board members when the decision was issued.[2]

2. *D.R. Horton* Was Incorrectly Decided

D.R. Horton was also incorrectly decided for a number of reasons. First, it contradicts the Supreme Court's unequivocal holding that the Federal Arbitration Act ("FAA") requires enforcement of agreements to arbitrate employment claims "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32; *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (enforcing a collective action waiver and compelling arbitration of an individual's FLSA overtime claim).

Second, as the Supreme Court has made clear after the Board's *D.R. Horton* decision, the FAA requires enforcement of arbitration agreements according to their terms unless another statute - here the NLRA - contains a clear "congressional command" to the contrary "even when the claims at issue are federal statutory claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (citing *CompuCredit v. Greenwood*, 132 S. Ct. 665, 669 (2012)). Such a "congressional command" must have "a clarity that far exceeds" the generic language regarding the creation of causes of action found in many statutes, including the NLRA. Nothing in the NLRA's text or legislative history suggests that Congress intended to ban a class action waiver in an arbitration agreement. *D.R. Horton*, 737 F.3d at 359-61. Indeed, both the Fifth Circuit and even an NLRB Administrative Law Judge recently concluded that the NLRA entails no such congressional command, and, therefore, it must defer to the FAA. *See id*; *Chesapeake Energy Corp.*, Case No. 14-CA-100530, JD(OKC)-78-13, slip op. at 9 (NLRB Div. of Judges Nov. 9, 2013) (concluding that *Horton* cannot survive *Italian Colors and CompuCredit* because it was impossible for the NLRA to contain a clear congressional command rejecting the waiver of class actions since the NLRA was enacted decades before the advent of class actions).

Third, the Board's attempt to interpret the Norris-LaGuardia Act ("NGA") in *D.R. Horton* was incorrect. The NGA is an anti-injunction statute. It deprives courts of the jurisdiction to issue injunctions in labor disputes, except under very specific exceptions. *D.R. Horton* was not an injunction proceeding and the NGA was simply inapplicable to it. The Board's characterization in *D.R. Horton* of the right to engage in class and collective legal actions as "the core substantive right" protected by federal labor policy, as set forth in the NGA, was incorrect given that when the NGA was passed in 1932, employment class and collective actions did not exist.

Fourth, agreements to arbitrate non-NLRA claims on an individual basis do not require employees to forego any substantive rights under the NLRA. The NLRA does not dictate the forum and procedures for adjudicating claims brought under statutes other than the NLRA. *See 14 Penn Plaza*, 556 U.S. at 257 ("Judicial nullification of contractual concessions . . . is contrary to what the Court

[2] *Noel Canning* is fully briefed and has been argued before the Supreme Court, with a decision expected soon. At the very least, the Region should withhold issuance of a complaint in this case until the Court's decision; it is undisputed that if the Court upholds the D.C. Circuit, the Board's *D.R. Horton* decision will be invalid.

has recognized as one of the fundamental policies of the National Labor Relations Act – freedom of contract.").

Fifth, *D.R. Horton* violates employees' Section 7 right to refrain from acting collectively. 29 U.S.C. § 157. It is settled law that unions and non-union employees are on equal footing in their power to waive judicial procedures in favor or arbitration. *14 Penn Plaza*, 556 U.S. at 256. Therefore, the Board's recognition in *D.R. Horton* that a union can agree to arbitration on an individual basis on behalf of its members, 357 NLRB No. 184, slip op. at 10, necessarily recognizes the right of a non-union employee also to agree to arbitration on an individual basis. The Board in *D.R. Horton* claimed that the union's waiver of such rights "stems from the *exercise* of Section 7 rights . . . ." *Id.* (emphasis in original). As noted above, however, employees have a Section 7 right not to join a union and not to act collectively, and thus a non-union employee's agreement to arbitrate non-NLRA claims on an individual basis also "stems from the *exercise* of Section 7 rights. . . ." *Id.* (emphasis in original).

Sixth, since *D.R. Horton*, more than 30 federal courts - including the Second, Fifth, Eighth, and Ninth Circuit Courts of Appeal - have outright rejected it or refused to follow it, and even the Board's decision in *D.R. Horton* has been overturned. *See, e.g.*, *D.R. Horton*, 737 F.3d 344; *Walthour v. Chipio Windshield Repair, LLC*, Case No. 13-11309, 2014 U.S. App. LEXIS 5315 (11th Cir. Mar. 21, 2014); *Raniere v. Citigroup, Inc.*, 533 Fed. Appx. 11 (2d Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young*, 734 F.3d 871 (9th Cir. 2013); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 CIV. 2308-BSJ-JLC, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *see also Delock v. Securitas Security Servs, USA, Inc.*, No. 11-cv-520-PM, slip op. at 11-16 (E.D. Ark. Aug. 1, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 213 (Cal. Ct. App. 2012); *Spears v. Mid-Am. Waffles, Inc.*, No. 11-2273-CM, 2012 WL 2568157 (D. Kan. July 2, 2012); *DeOliveira v. Citicorp N. Am., Inc.*, --- F. Supp. 2d ----, No. 8:12–cv–251–T–26TGW, 2012 WL 1831230 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, No. 3:11-cv-1301-MMA-DHB (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro*, -- F. Supp. 2d -----, No. 11-CV-05405, 2012 WL 1604851 (N.D. Cal. May 7, 2012); *Sanders v. Swift Transp. Co. of Ariz., LLC*, --- F. Supp. 2d ----, No. 10-CV-03739 NC, 2012 WL 523527 (N.D. Cal. Jan. 17, 2012); *Palmer v. Convergys Corp.*, No. 7:10-CV-145 HL, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012); *Fatemeh Johnmohammadi v. Bloomingdales, Inc. et al.*, No. 11-CV-6434-GW-AJWx, Dkt. No. 31 (C.D. Cal. Feb. 23, 2012).

In fact, several courts have upheld the very Agreement at issue in this proceeding, concluding that it is "fundamentally fair," "protects the employee," "is decidedly not one-sided in favor of the employer," and "does not deprive [employees] of an accessible and affordable forum" for resolving disputes.

For all of these reasons, *D.R. Horton* was wrongly decided, the Region should refuse to apply it to the instant case and the charge should be dismissed.

B. The Arbitration Agreement at Issue in This Proceeding Differs Materially from the Arbitration Agreement Found Unlawful in *D.R. Horton*.

Even if the Region refuses to follow *every* jurisdiction that has considered *D.R. Horton* and nonetheless applies it to the facts of the instant case, the Charge should still be dismissed based on the material differences between the Agreement and the arbitration agreement at issue in *D.R. Horton*.

The Board in *D.R. Horton* emphasized the limits of its holding, stating that "[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case." 357 NLRB No. 184, slip op. at 12. The Agreement is not among the "small percentage" of arbitration agreements covered by *D.R. Horton*.

Unlike the mandatory arbitration agreement in *D.R. Horton*, the Agreement explicitly protects employees' rights to file charges with the Board and other administrative agencies. Specifically the Agreement permits claims to be brought "without limitation" before the Board. Therefore, under the Agreement, employees may, individually or as a group, file a charge with the Board. The right to file a charge is a significant factor weighing in favor of the enforceability of the arbitration agreement. *See Gilmer*, 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.").

If the agency finds that the employees' claim has merit, the agency can prosecute the claim against the employer and seek a remedy on behalf of all affected employees. The agency's decision to pursue enforcement of covered claims on behalf of employees is an adequate substitute for class or collective action litigation brought by the employees. Therefore, by protecting the employees' right to file administrative charges, the Agreement does not foreclose the pursuit of group-wide remedies.

Moreover, the Agreement does not prohibit employees from participating in a class or collective action in order to challenge the enforceability, validity and revocability of the Agreement. Instead the Agreement specifically excludes from its coverage disputes as to the enforceability of the Agreement or any portion of the Agreement.

These are material differences from the agreement at issue in *D.R. Horton* and removes the Agreement from the "small percentage of arbitration agreements" implicated by the Board's decision in that case.

C. The Charging Party Has Not Engaged in Any Protected Concerted Activity Under the Act.

The Charge should also be dismissed because the Charging Party has not engaged in any protected concerted activity under the Act. All the Charging Party has done is file a lawsuit, months *after* her termination from the Company, seeking additional overtime compensation. There is nothing to suggest that the Charging Party filed her lawsuit for any reason other than for personal gain.

The Charging Party's activities do not constitute protected concerted activity under the NLRA:

> [A]n individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve the waiver of any Section 7 right. To conclude otherwise would be a return to the concept of 'constructive concerted activity' that the Board rejected in *Meyer Industries* . . . .

General Counsel Memorandum No. 10-06 at 6 (2010).

The Charging Party simply has not engaged in any concerted activity, and her Charge should be dismissed on this basis.

D. The Charge Is Time-Barred by Section 10(b) of the Act.

The Charge should be dismissed because it was filed more than six months after the Charging Party entered into the Agreement. A *D.R. Horton* violation is entirely dependent on the facts and circumstances occurring at the time that the Charging Party entered into the Agreement.

For this reason, a violation of *D.R. Horton* is akin to a collective-bargaining agreement that is alleged to be unlawful based on the circumstances existing at the time an agreement is entered into.

In *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court held that "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." *Id.* at 422. The allegation in that case was that a collective bargaining agreement containing a union security clause was unlawful because the union did not represent a majority of the employees in the bargaining unit at the time the agreement was entered into. There was no dispute as to that fact before the Supreme Court - the union did not challenge that it lacked majority status at that time. *Id.* at 412 n.1. The charge was filed more than six months after the agreement was entered into, and the complaint alleged that the continued enforcement of the agreement violated the Act. The Supreme Court held that this complaint was barred by Section 10(b), reasoning that:

> Where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice is not merely evidentiary, since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416-17.

Similarly, in this case, a violation depends entirely on the facts and circumstances at the time the Agreement was entered into. Because the Charging Party entered into the Agreement on November 14, 2012 but did not file her charge until 18 months later on May 5, 2014, well outside the 10(b) period, the allegation is an effort to revive a now "legally defunct unfair labor practice." *Id.* at 417. The Charge should be dismissed on this basis.

E. The Agreement Expressly Permits Employees to File Claims and Charges With the Board.

Finally, the Agreement does not violate Section 8(a)(1) of the Act by prohibiting employees from filing charges with the Board or cooperating in Board processes.

First, an employee would not reasonably interpret the Agreement to prohibit the filing of charges with the Board. To this end, the Agreement only applies to disputes that otherwise "would be resolved in a court of law." Board charges are not the type of claims that would ordinarily be resolved in a court of law. On the contrary, an NLRB claim or charge is overwhelmingly resolved through settlement, a hearing before an Administrative Law Judge or by a Board decision, and is very infrequently resolved by a court of law. *See, e.g., General Counsel's Memorandum* 13-01 (2013) (revealing that 115 total cases in fiscal year 2012 out of about 24,275 filed annually were subject to federal court review in 10(j) or 10(l) proceedings or due to appeals filed with the Court of Appeals seeking review of Board decisions). With only approximately .004% of the annual charges processed by the Board in being heard by a court (it is unclear how many were even actually *resolved* by a court), no reasonable employee would interpret the Agreement's application to claims that otherwise "would be resolved in a court of law" to include the filing of charges with the Board.

Furthermore, the policy cannot be read in isolation but must be read in the context in which it appears. *See Intermet Stevensville*, 350 NLRB 1349, 1351 (2007), citing *U-Haul of California*, 347 NLRB 375, 379-380 (2006). As a result, even if the Board concluded that the Agreement was ambiguous as to whether employees could file claims with the Board or access the Board's processes – which it is not – any such ambiguity was subsequently cured by the Agreement's explicit statement that employees were permitted to file such claims and charges with the Board.

In lieu of revising the Agreement every time another court decision issued addressing the enforceability of arbitration agreements, the Agreement generally exempted from its coverage claims and charges filed with administrative agencies that permit such claims to be filed notwithstanding the Agreement. In the *very* next sentence, the Agreement made it crystal clear that the Board is one of those administrative agencies and that employees are permitted to file such charges notwithstanding the Agreement, stating that "[s]uch administrative claims include without limitation claims or charges brought before . . the [Board]." Far from interfering with employees' Section 7 rights, the Agreement's explicit reference to employees' right to file charges with NLRB served to foster and protect employees' Section 7 rights by reminding them of their right to file such charges and providing the NLRB's web address to assist them in doing so.

Because the Agreement expressly permitted employees to file charges with the Board, a reasonable employee reading the Agreement could not conclude - or even suspect - that they would be prohibited

from filing charges with the Board or participating in the Board's processes. *See e.g.*, *Cox Communications, Inc.*, Case No. 17-CA-087612 at 5 (Div. of Adv.) (Oct. 19, 2012) (finding a social media policy lawful because it contained a clause expressly stating that it was not intended to interfere with employees' Section 7 activity).

CONCLUSION

For all of these reasons, the Charge does not have merit and should be dismissed absent withdrawal. Should you have any questions or need any additional information, please do not hesitate to contact me.

Respectfully submitted,

Nicole A. Buffalano /es

Nicole A. Buffalano

SolarCity Corp. *and* Anita Beth Irving. Case 32–CA–128085

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On December 22, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing mandatory arbitration agreements. *SolarCity Corp.*, 363 NLRB No. 83 (2015). Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the agreements unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *SolarCity*, 363 NLRB No. 83, slip op. at 2–4. The Board also found that the agreements violated the Act on the basis that employees reasonably would construe them to restrict their access to the Board's processes. Id., slip op. at 4–6.

The Respondent filed a petition for review with the United States Court of Appeals for the Fifth Circuit. The Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 1632 (2018).

On August 15, 2018, the Fifth Circuit granted the Board's motion to vacate the portion of the Board's Order governed by *Epic Systems* and to remand the remainder of the case for further proceedings before the Board. On March 27, 2020, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for further proceedings in light of the *Boeing*[1] standard, discussed below. No party filed a response. We find that a remand is unnecessary because the only remaining issue in this case concerns the facial lawfulness of the Respondent's agreements, and those agreements are already part of the record before us.

The National Labor Relations Board[2] has reviewed the entire record. For the reasons discussed below, we find that the Respondent's agreements do not unlawfully restrict access to the Board and its processes in violation of Section 8(a)(1). Accordingly, we vacate the underlying decision and dismiss the complaint.[3]

I. FACTS

The Respondent, located in San Mateo, California, is engaged in the business of providing solar energy services. Since at least November 2013, the Respondent has maintained an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" applicable to its California employees (the California 2013 Agreement). The Respondent revised the agreement in March 2014 (the California 2014 Agreement).

In relevant part, the California 2013 Agreement provides as follows (emphasis added):

> *12. Arbitration*
>
> A. **This Agreement applies to any dispute arising out of or related to Employee's employment, including termination of employment, with the Company** or one of its affiliates, subsidiaries or parent companies. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. **The Agreement also applies, without limitations, to disputes regarding the employment relationship,** trade secrets, unfair

[1] *Boeing Co.,* 365 NLRB No. 154 (2017).

[2] Member Emanuel, who is recused, is a member of the panel but did not participate in this decision on the merits.

In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also, e.g., *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *D. R. Horton*, above, 357 NLRB at 2277 fn. 1; *1621 Route 22 West Operating Co.*, 357 NLRB 1866, 1866 fn. 1 (2011), enfd. 725 Fed.Appx. 129 (3d Cir. 2018).

[3] In a related case that is also issuing today, we address whether the Respondent violated Sec. 8(a)(1) by maintaining four substantially similar arbitration agreements. *SolarCity Corp.*, 369 NLRB No. 141 (2020) (*SolarCity II*). In *SolarCity II*, which is before the Board on exceptions, we reverse the judge's finding of a violation and dismiss the complaint.

competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding Workers compensation, state disability insurance and unemployment insurance claims). **Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before** the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), **the National Labor Relations Board (www.nlrb.gov).** the Office of Federal Contract Compliance Programs (www.dol.gov/esalofccp) and other similar federal and state agencies. Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

. . . .

D. **In arbitration,** the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by the forum state's procedural rules applicable to court litigation as interpreted and applied by the Arbitrator. However, **there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action** ("Class Action Waiver"), or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought on behalf of a class of persons or the general public. Although an Employee will not be retaliated against, disciplined, threatened with discipline as a result of his or her filing of or participation in a class or collective action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims.

Jt. Exh. 10.

The California 2014 Agreement states in relevant part (emphasis added):

12. *Arbitration*. In consideration of my employment with the Company, its promise to arbitrate all disputes with me, and my receipt of compensation and benefits provided to me by the Company, at present and in the future, **the Company and I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration,** and not by way of court or jury trial, **except as otherwise provided herein or to the extent prohibited by applicable law.** I acknowledge that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq., and evidences a transaction involving commerce.

A. Scope of Arbitration Agreement

(1) **Disputes which the Company and I agree to arbitrate include, without limitation,** disputes arising out of or relating to interpretation or application of this Agreement**, disputes regarding my employment with the Company or its affiliates (or termination thereof),** trade secrets, unfair competition, compensation, meal and rest periods, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, **and all other statutory** and common law **claims** (excluding workers' compensation, state disability insurance and unemployment insurance claims). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration.

(2) **By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law.** Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, representative, or private attorney general proceeding, including without limitation pending but not certified class actions ("Class

Action Waiver"). I understand and acknowledge that this Agreement affects my ability to participate in class, collective, or representative actions.

. . . .

(4) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, **the Company agrees not to retaliate, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing in a class, collective or representative action in any forum.**

(5) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, **this Agreement does not prohibit me from pursuing** claims that are expressly excluded from arbitration by statute (including, by way of example, claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203)); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or **claims with** local, state, or **federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with** the U.S. Equal Employment Opportunity Commission, **the National Labor Relations Board,** the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. However, I expressly acknowledge and agree that such permitted agency claims do not include claims under California Labor Code Section 98 et seq. with the California Labor Commissioner or Division of Labor Standards Enforcement ("DLSE")—such DLSE claims must be arbitrated in accordance with the provision of this Agreement.

Jt. Exh. 9.

I. DISCUSSION

The Fifth Circuit's August 15, 2018 order having disposed of all allegations controlled by the Supreme Court's decision in *Epic Systems*, above, the remaining issue for decision is whether the Agreements unlawfully restrict access to the Board and its processes. In the prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *SolarCity*, 363 NLRB No. 83, slip op. at 4–6. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees "would reasonably construe . . . to prohibit Section 7 activity." 343 NLRB at 647.

While *SolarCity* was pending on appeal, the Board issued its decision in *Boeing*, in which it overruled the "reasonably construe" prong of *Lutheran Heritage*, announced a new standard for evaluating the lawfulness of facially neutral rules and policies, and decided to apply the new standard retroactively to all pending cases. 365 NLRB No. 154, slip op. at 2–3, 16–17. Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Section 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Section 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3.[4]

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, we held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). We further stated that where an arbitration agreement does not contain such an explicit prohibition but rather is facially

[4] As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3.[5] The Board held that, under *Boeing*, arbitration agreements violate the Act when, "taken as a whole, [they] make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6. The Board also held that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

Recently, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, we addressed the lawfulness of an agreement that required employees to arbitrate employment-related disputes, but that also included "savings clause" language informing employees that they are free to file charges with the Board. 369 NLRB No. 70 (2020). The coverage language of the arbitration agreement at issue in *Anderson Enterprises*, when reasonably interpreted, encompassed claims arising under the Act. However, the agreement's savings clause provided that "[c]laims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." Id., slip op. at 1. We found that the savings clause was sufficiently prominent, id., slip op. at 3, and it specifically and affirmatively stated that employees may bring claims or charges before the Board. Accordingly, we concluded that the agreement could not be reasonably understood to potentially interfere with employees' access to the Board and its processes and that it was lawful under *Boeing* Category 1(a). Id., slip op. at 4. In doing so, we overruled several pre-*Boeing* decisions that had found similar savings clauses legally insufficient, including the underlying decision in the instant case. Id.

Here, similar to the arbitration agreement in *Anderson Enterprises*, the Respondent's Agreements require arbitration of all employment-related disputes, necessarily including claims arising under the Act. See id., slip op. at 3. However, the Agreements contain savings clauses that explicitly permit employees to bring claims to the Board. The California 2013 Agreement contains the same savings clause as the arbitration agreement in *Anderson Enterprises*, stating:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board.

The California 2014 Agreement uses different language, but it preserves for employees the same right to file a charge with the Board:

> [T]his Agreement does not prohibit me from pursuing . . . claims with . . . federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.

Consistent with *Anderson Enterprises*, we conclude that these savings clauses render the Agreements lawful. They specifically and affirmatively state that employees may bring claims and charges before the National Labor Relations Board. See *Anderson Enterprises*, 369 NLRB No. 70, slip op. at 3.[6] Although it is unlikely that employees would know whether "applicable law" permits them to access the Board or permits the Board to adjudicate claims "notwithstanding the existence of an enforceable arbitration agreement," any uncertainty is immediately dispelled by language expressly clarifying that permitted claims include claims, charges, or complaints brought before or filed with the National Labor Relations Board.[7]

[5] As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See id., slip op. at 9.

[6] The savings clauses are also sufficiently prominent. The savings clause in the California 2013 Agreement is located immediately after the coverage language. See id. (savings clause in same location). The savings clause in the California 2014 Agreement is located just one page below the coverage language, and the Agreement's introductory paragraph notes that there are exceptions. See *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019) (finding savings clause sufficiently prominent where separated from coverage language by one page and referenced earlier in agreement).

[7] As in *Anderson Enterprises*, the Agreements also provide that "[n]othing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration." See 369 NLRB No. 70, slip op. at 4 fn. 6. The Board did not rely on this language in finding the Agreements unlawful in the underlying decision, and the General Counsel does not rely on it to establish a violation. Accordingly, it is not necessary for us

In the underlying decision, the Board relied in part on the class- and collective-action waivers (class-action waivers) contained in the Agreements to support its finding of unlawful interference with access to the Board. See 363 NLRB No. 83, slip op. at 6. We disagree that the class-action waivers affect the outcome. First of all, the California 2013 Agreement's class-action waiver is expressly limited to disputes resolved in arbitration, stating that "*[i]n arbitration* . . . . there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action." Thus, the California 2013 Agreement's class-action waiver cannot possibly have any bearing on Board charge filing.

Although the California 2014 Agreement's class-action waiver is not expressly limited to arbitration,[8] the Agreement must be read as a whole,[9] and as just discussed, it includes savings-clause language expressly preserving the right to file "a charge or complaint with . . . the National Labor Relations Board." Moreover, the class-action waiver cannot interfere with a right to file a class, collective, or representative Board action because Board procedures do not include such actions.[10] Charging parties do not represent anyone; they simply set the Board's investigatory machinery in motion. See NLRA Section 10(b) (providing in relevant part that the Board has the power to issue complaint "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice"). If a charge is found to have merit, the General Counsel prosecutes the action "'in the public interest and not in vindication of private rights.'" *Kelly Services, Inc.*, 368 NLRB No. 130, slip op. at 5 fn. 8 (2019) (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957)). It is unlikely that rank-and-file employees unfamiliar with Board law would know as much. However, it is equally unlikely they would believe to the contrary, since the California 2014 Agreement does not remotely suggest that the class-action waiver applies to Board proceedings. Employees would not reasonably assume the class-action waiver applies to Board proceedings simply because it is not expressly limited to arbitral proceedings. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2; *Boeing*, 365 NLRB No. 154, slip op. at 9.[11]

For these reasons, we find that the Agreements cannot be reasonably understood to interfere with employees' access to the Board and its processes. The Agreements are therefore lawful under *Boeing* Category 1(a). See *Boeing*, 365 NLRB No. 154, slip op. at 4 (holding that Category 1(a) consists of "rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights") (internal footnote omitted); see also *SolarCity II*, 369 NLRB No. 141, slip op. at 4-5 (finding that the Respondent lawfully maintained four substantially similar arbitration agreements). Accordingly, we vacate the underlying decision and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

to address these provisions. In any event, even if they were considered, we would find these provisions do not detract from the clear import of the savings clauses that employees are free to seek redress from the Board.

We note that a savings clause in an arbitration agreement need not necessarily expressly refer to the National Labor Relations Board, the NLRB, or the Board to sufficiently preserve employees' right to file charges with the Board. See *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies"). Necessarily, then, there can be no question of the legal sufficiency of savings clauses like those here, which expressly and prominently refer to employees' right to bring claims or charges before the National Labor Relations Board.

[8] The California 2014 Agreement states that employees "expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by law."

[9] When interpreting employer policies, the Board "'must refrain from reading particular phrases in isolation.'" *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage*, 343 NLRB at 646).

[10] The Board does not have class actions, Fair Labor Standards Act–type collective actions, or Private Attorneys General Act–type representative actions.

[11] Moreover, the California 2014 Agreement also contains a provision assuring employees that "the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Sec[.] 7 of the National Labor Relations Act by filing or participating in a class, collective or representative action *in any forum*" (emphasis added). Thus, even if employees mistakenly thought that Board procedures allowed for class, collective, or representative actions, the foregoing language would assure them that they could file such actions safely.